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No. 95-1773

In the

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF TEXAS, *et al.*,

Petitioners,

v.

CHERYL J. HOPWOOD, *et al.*,

Respondents.

On Petition for Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE STATES OF MARYLAND, ARIZONA, HAWAII, IOWA, MASSACHUSETTS, MINNESOTA, NEW MEXICO, OKLAHOMA, WEST VIRGINIA, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Is the educational objective of achieving diversity in a student body a sufficiently compelling governmental interest to permit the consideration of an applicant's race as one of many factors in a university's admissions decision?

2. May an institution of higher education voluntarily undertake race-conscious remedial measures in response to the findings of State executive branch officials that such measures are necessary to address the continuing effects of prior segregation and discrimination by the State's elementary, secondary and postsecondary education agencies?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

INTEREST OF *AMICI CURIAE* AND INTRODUCTORY STATEMENT 1

REASONS FOR GRANTING REVIEW 3

I. The Decision Below Conflicts with Well-Established Precedent That States and Institutions of Higher Education Have Relied Upon in Achieving a Racially Diverse Student Body. 3

II. State Executive Branch Officials Are Constitutionally Permitted to Determine the Need for Race-Conscious Measures at Public Universities to Remedy the Present Effects of a State's Past Discrimination 13

CONCLUSION 19

TABLE OF AUTHORITIES

CASES:

Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995) 6
Adams v. Richardson, 356 F. Supp. 92 (D.D.C. 1973) 17
Board of Education v. Dowell, 498 U.S. 237 (1991) 16, 17
Brown v. Board of Education, 347 U.S. 483 (1954) . 1, 6
Columbus Board of Education v. Penick, 443 U.S. 449 (1979) 18
Davis v. Halpern, 768 F. Supp. 968 (E.D.N.Y. 1991) .. 7

DeRonde v. Regents of the University of California, 172 Cal. Rptr. 677, 625 P.2d 220, *cert. denied*, 454 U.S. 832 (1981) 7
Hammon v. Barry, 826 F.2d 73 (D.C. Cir. 1987) 8
Hart v. Community School Board of Education, 512 F.2d 37 (2d Cir. 1975) 18
Keyes v. School District No. 1, 413 U.S. 189 (1973) 18
Knight v. Alabama, 14 F.3d 1534 (11th Cir. 1994) ... 17
Mallory v. Harkness, 895 F. Supp. 1556 (S.D. Fla. 1995) 8
McDonald v. Hogness, 92 Wash.2d 431, 598 P.2d 707 (1979) (*en banc*), *cert. denied*, 445 U.S. 962 (1980) 7
Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990) 6
Milliken v. Bradley, 433 U.S. 267 (1977) 18
O'Donnell Construction Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992) 7
Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976) 18
Planned Parenthood v. Casey, 505 U.S. 833 (1992) 12, 13
Podberesky v. Kirwan, 956 F.2d 52 (4th Cir. 1992) 8
Regents of the University of California v. Bakke, 438 U.S. 265 (1978) ..... 2, *passim*
Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985) 7
Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 7, 13, 14, 15
Richardson v. Blanton, 597 F.2d 1078 (6th Cir.), *cert. denied*, 444 U.S. 886 (1979) 17
Roe v. Wade, 410 U.S. 959 (1973) 12
Ross v. Houston Independent School District, 699 F.2d 218 (5th Cir. 1983) 18
Sweezy v. New Hampshire, 354 U.S. 234 (1957) 5

United States v. Board of Education,
832 F. Supp. 836 (D.N.J. 1993) 8
United States v. Brown University,
5 F.3d 658 (3d Cir. 1993) 8
United States v. Fordice, 505 U.S. 717 (1992) 17
United States v. Louisiana, 9 F.3d 1159
(5th Cir. 1993) 17
United Steelworkers of America v. Weber,
443 U.S. 193 (1979) 15
UWM Post, Inc. v. Board of Regents of the University of Wisconsin System, 774 F. Supp. 1163
(E.D. Wis. 1991) 8
Wygant v. Jackson Board of Education,
476 U.S. 267 (1986) 6, 15

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS, AND RULES :

U.S. CONST. amend XIV 3

Title VI of the Civil Rights Act of 1964,
42 U.S.C. § 2000d 8

ARIZ. REV. STAT. ANN. § 15-1639 (1991) 11
ARK. STAT. ANN. § 6-81-802 (1987) 11
CONN. GEN. STAT. § 10a-11(a) (1996) 10
FLA. STAT. § 228.2001(4) (1989) 11
IDAHO CODE § 33-4602 (1995) 11
IOWA CODE § 261.101 (Supp. 1995) 11
MD. EDUC. CODE ANN. (1992)
§ 10-204(8) 15
§ 11-105(e) 15
§ 12-107(a)(3) 10, 15
MONTANA CODE ANN. § 20-25-421 (4)(a) (1995) 11
NEB. REV. STAT. § 85-1, 125 (1995) 11
WIS. STAT. § 36.01(1) (1992) 11

59 Fed. Reg. 4271 (Jan. 31, 1994) 17
59 Fed. Reg. 8756 (Feb. 23, 1994) 9

H.R. REP. NO. 411, 102D CONG., 1ST SESS. 7-8
DEC. 4, 1991 9

Sup. Ct. R. 37 1

MISCELLANEOUS:

Applebome, *Universities Troubled by Decision Limiting Admission Decisions*,
N.Y. TIMES, Mar. 21, 1996, at A1 13
Alenikoff & Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after* Shaw v. Reno,
92 MICH. L. REV. 588 (1993) 10
Ely, *The Supreme Court, 1977 Term, -- Forward: On Discovering Fundamental Values*,
92 HARV. L. REV. 5 (1978) 5
Healy, *Education Department Urges Public Colleges to Keep Affirmative-Action Programs*,
THE CHRONICLE OF HIGHER EDUCATION,
May 3, 1996, at A27 12
Kunen, *The End of Integration*, TIME,
Apr. 29, 1996, at 39 18
McCarthy, *Elusive "Unitary Status,"*
69 EDUC. L. REP. 9 (West 1991) 18
Note, *The Supreme Court, 1977 Term*,
92 HARV. L. REV. 57 (1978) 6
Rosen, *The Day The Quotas Died*, THE NEW REPUBLIC, Apr. 22, 1996, at 24 12
Rudenstine, *The Uses of Diversity*,
HARVARD MAGAZINE, Mar.-Apr. 1996, at 48 4
Scholars' Reply to Professor Fried,
99 YALE L.J. 163 (1989) 10

Tatel, *Desegregation Versus School Reform: Resolving the Conflict*, 4 STAN. L. & POL'Y REV. 61, 66 (1992) 16, 18
Tribe, AMERICAN CONSTITUTIONAL LAW § 16-22, at 1529 (2d ed. 1988) 10

N.Y. TIMES, Mar. 22, 1996, at A26, col. 1 (editorial) . 10

University of California at Berkeley, OCR Case No. 09-89-2099 (Mar. 1, 1996) 8
University of California at Berkeley School of Law, OCR Case No. 10906001 (Sept. 25, 1992) 9
University of California, San Diego, OCR Case No. 09-92-2002 (Mar. 21, 1994) 9
University of Wisconsin, Whitewater, OCR Case No. 05-90-2106 (Oct. 27, 1994) 9

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Pursuant to Sup. Ct. R. 37, the signatory States respectfully submit this brief as *amici curiae* in support of the State of Texas' petition for a writ of certiorari.

INTEREST OF AMICI CURIAE AND INTRODUCTORY STATEMENT

This Court recognized over forty years ago that "education is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). That function lies at the heart of this case, which directly challenges the ability of the *amici* States and their institutions of higher education to secure the educational benefits of racial and ethnic diversity and to

eradicate the lingering effects of past discrimination.

The composition of the student body at an institution of higher education has a direct bearing on the kind of education provided. A diverse academic environment and community reflecting a plurality of cultural, racial, ethnic, and gender perspectives is considered fundamental to providing a first-class program of higher education. "[I]t is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this nation of many peoples." *Regents of the University of California v. Bakke*, 438 U.S. 265, 312-13 (1978) (Powell, J.) (citation omitted).

In recognition of the value that diversity serves in higher education, this Court's landmark decision in *Bakke* endorsed the creation of a diverse student body as a compelling interest for public colleges and universities. Many institutions of higher education within the *amici* States have since adopted race-conscious programs in admissions and financial aid, in reliance on *Bakke*'s validation of their right to achieve diversity in their student bodies. In furtherance of *Bakke*'s additional recognition that a racial classification may be imposed in response to judicial, legislative, or administrative findings of past discrimination, *see* 438 U.S. at 307, many colleges and universities have also implemented these programs to remedy the present effects of past discrimination and to ensure equality of educational access to all of their citizens. Therefore, for almost two decades, the *amici* States and their educational institutions have relied on the well-settled rule of law set forth in *Bakke*: that the goals of achieving diversity and correcting discrimination are sufficiently compelling to justify the individualized consideration of race.

The decision below prohibiting the University of Texas School of Law from even considering race as a factor in law school admissions would dramatically alter the law as educational institutions have long understood it. In rejecting the independent educational interest in achieving and maintaining a diverse student body, the decision below conflicts with settled applications of *Bakke* by this Court, other Federal courts of appeal and district courts, State courts of last resort, and administrative rulings of the United States Department of Education, and undermines the established practice of numerous institutions of higher education in the vitally important area of admissions. The decision below also effectively eliminates the ability of public educational institutions to remedy the effects of past discrimination by improperly restricting the types of findings and effects of past discrimination that may justify voluntary race-conscious remedial action in higher education.

Because of the strong State and national interests at stake, *amici* urge this Court to grant the writ and reverse the decision below.

REASONS FOR GRANTING REVIEW

I. THE DECISION BELOW CONFLICTS WITH WELL-ESTABLISHED PRECEDENT THAT STATES AND INSTITUTIONS OF HIGHER EDUCATION HAVE RELIED UPON IN ACHIEVING A RACIALLY DIVERSE STUDENT BODY.

In holding that *any* consideration of race or ethnicity for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment, the Court of Appeals discarded a landmark precedent of this Court that it, the lower federal courts, State courts, and the

U.S. Department of Education have uniformly followed. As a result, as the Chief Judge and seven other judges of the Court of Appeals warned, the panel opinion below "will literally change the face of public educational institutions throughout Texas, the other states of this circuit, and this nation." App. at E2. *Amici* urge this Court to review this critically important case because the decision below completely upsets the good-faith reliance that States and the higher education community have placed on the continuing legality of race-conscious programs as a means to attain a diverse student body.

As the Dean of the University of Michigan School of Law testified below, diversity is an "accepted policy and value" at Michigan and other higher education institutions, and "an accepted way of life...." R. Doc. 207 at 5. Indeed, "student diversity has, for more than a century, been valued for its capacity to contribute powerfully to the process of learning and to the creation of an effective educational environment." Rudenstine, *The Uses of Diversity*, HARVARD MAGAZINE, Mar.-Apr. 1996, at 48, 49. Embracing these settled educational interests, Justice Powell stated in *Bakke* that a "diverse student body" contributing to a "robust exchange of ideas" "*clearly* is a constitutionally permissible goal for an institution of higher education." 438 U.S. at 311-12 (emphasis added).[1] In so

[1] According to Justice Powell, racial and ethnic diversity on campus is a goal protected by the academic freedom guarantees of the First Amendment. Noting the need to safeguard the "'four essential freedoms' of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught and *who may be admitted to study*," Justice Powell concluded that the "atmosphere of 'speculation, experiment and creation'-- so essential to the quality

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finding, Justice Powell specifically discussed and approved a policy previously adopted by Harvard College that considered an applicant's race as a "plus" factor in the admissions decision. 438 U.S. at 316-17. The *Bakke* decision has thus provided institutions of higher education with this Court's legal imprimatur to consider race as a constitutionally permissible means to attain a diverse student body.

The Court of Appeals nevertheless determined that it was free to disregard Justice Powell's seminal opinion, stating that no other Justice joined him in the view that diversity is a compelling interest. App. at A23. On the contrary, Justice Powell's resolution of the constitutional issues made his the pivotal opinion in *Bakke*, a fact that even the Court of Appeals acknowledged. *See* App. at A19 ("Justice Powell's opinion ... has played a *prominent* role in subsequent debates concerning the impact of *Bakke*.") (emphasis added). Indeed, the California Supreme Court had enjoined the UC Davis Medical School from considering the race of any applicant in its *Bakke* decision, and this portion of its judgment was *reversed* by a full majority of this Court. 438 U.S. at 320.[2] The Court of Appeals panel was wrong, therefore, in deciding unilaterally

[1](...continued)
of higher education -- is widely believed to be promoted by a diverse student body." 438 U.S. at 312 (*quoting Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)) (emphasis added).

[2] As John Hart Ely stated in summarizing the *Bakke* decision, after quoting the portion of Justice Powell's opinion that was joined by a majority of the Court, "*That* is the Opinion of the Court." Ely, *The Supreme Court, 1977 Term--Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 10 n.33 (1978) (emphasis in original).

that it was not bound by what is "widely touted as the most significant civil rights case since *Brown v. Board of Education*, 347 U.S. 483 (1954)." Note, *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 131 n. 4 (1978).

The Court of Appeals' decision stands in stark contrast not only to *Bakke* itself, but also to the fact that this Court, the lower federal courts, State courts, and the United States Government have repeatedly endorsed Justice Powell's articulation that race may be one of many factors that institutions of higher education may consider as a legitimate means to attain a racially diverse student body. For example, since *Bakke* this Court has at least twice recognized that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated...." *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 568 (1990) (*quoting Bakke*, 438 U.S. at 311-13); *see also Wygant v. Jackson Board of Education*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) (the interest in racial diversity is "sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest.").[3]

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[3] Although Justice O'Connor's dissenting opinion in *Metro Broadcasting* rejected the argument that racial diversity in ownership of broadcast licenses can be a compelling interest, she has never disavowed Justice Powell's opinion in *Bakke* that diversity in higher education serves a compelling interest. *See Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2127 (Stevens, J., dissenting) ("The proposition that fostering diversity may provide a sufficient interest to justify [a racial or ethnic classification] is *not* inconsistent with the Court's holding today -- indeed, the question is not remotely presented in this case...."); *See also* App. at A66 (Wiener, J., specially concurring) ("Justice O'Connor expressly states that *Adarand* is not the death knell of

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Further, in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), a unanimous Court cited Justice Powell's opinion in *Bakke* with approval, reaffirming the need for "autonomous decision-making by the academy" and a university's right to determine "who may be admitted to study ... as one of 'the four essential freedoms' of a university." *Id.* at 226 n.12.

The Court of Appeals' rejection of diversity as a compelling interest is also in conflict with the decisions of other courts that have likewise cited *Bakke* as permitting the consideration of race as a factor in diversity programs in the context of higher education. *See Davis v. Halpern*, 768 F. Supp. 968, 981 (E.D.N.Y. 1991) ("[I]n the absence of prior discrimination by the university the consideration of race (at least as one factor among many) by a university admissions process is constitutional only so far as it seeks to procure for the university the educational benefits which flow from having a diverse student body."); *DeRonde v. Regents of the University of California*, 172 Cal. Rptr. 677, 625 P.2d 220, 225, *cert. denied*, 454 U.S. 832 (1981) (law school admissions procedures which permitted consideration of "ethnic minority status" as a means of furthering diversity "passed federal constitutional muster under the standards prescribed by Justice Powell in *Bakke*"); *McDonald v. Hogness*, 92 Wash.2d 431, 598 P.2d 707 (1979) (*en banc*), *cert. denied*, 445 U.S. 962 (1980)

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[3](...continued)
affirmative action, ... especially not in the framework of achieving diversity in public graduate schools."); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) (Ginsburg, J., concurring) ("remedy for past wrong is not the exclusive basis upon which racial classifications may be justified") (*citing* Justice Stevens' concurrence in *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989)).

(upholding under *Bakke* analysis a medical school admissions procedure which considered race among other factors for the purpose of promoting diversity in the student body).[4]

In addition, the United States Department of Education, which is the agency entrusted with enforcement of Title VI of the Civil Rights Act of 1964 at educational institutions receiving federal financial assistance, has continually approved the use of race as a factor in university admissions decisions to foster student diversity.[5] In the student

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[4] *See also Podberesky v. Kirwan*, 956 F.2d 52, 56 n.4 (4th Cir. 1992) (university scholarship program reserved exclusively for African-Americans is inconsistent with holding in *Bakke* that racial or ethnic origin may be a "'single though *important* element'" in furthering a compelling state interest in diversity) (*quoting Bakke*, 438 U.S. at 315) (emphasis added); *United States v. Brown Univ.*, 5 F.3d 658, 674 (3d Cir. 1993) ("[T]he Supreme Court also has recognized that 'the atmosphere of 'speculation, experiment and creation' -- so essential to the quality of higher education -- is widely believed to be promoted by a diverse student body.'") (*quoting Bakke*, 438 U.S. at 312); *Hammon v. Barry*, 826 F.2d 73, 85 (D.C. Cir. 1987) (Silberman, J., concurring) ("the Court has recognized a legitimate, compelling governmental concern in state universities' seeking racial diversity in their student bodies for educational purposes") (*citing Bakke*, 438 U.S. at 311-15); *Mallory v. Harkness*, 895 F. Supp. 1556, 1560 (S.D. Fla. 1995) (same); *United States v. Board of Educ.*, 832 F. Supp. 836, 847-48 (D.N.J. 1993) (same); *UWM Post, Inc. v. Board of Regents of Univ. of Wis. System*, 774 F. Supp. 1163, 1176 (E.D. Wis. 1991) (same).

[5] Within the last three months, for example, the Department of Education's Office for Civil Rights ("OCR") concluded an exhaustive analysis of the affirmative action program operated by the admissions office at the University of California at Berkeley, OCR Case No. 09-89-2099 (Mar. 1, (continued...)

financial aid context, the U.S. Department of Education has publicly embraced the use of race-targeted scholarships by colleges and universities in several enumerated circumstances, including when a college or university seeks to attain a diverse student body. *See* "Final Policy Guidance," 59 Fed. Reg. 8756, 8759-62 (Feb. 23, 1994).[6] The Final Policy Guidance was developed after a lengthy deliberative process that included an extensive analysis of applicable legal authorities and public comments, and reflects a reaffirmation of federal policies in force for many years. *See* H.R. Rep. No. 411, 102d Cong., 1st Sess. 7-8 (Dec. 4, 1991) (noting rulings by federal officials in the early 1980s approving minority-targeted aid programs).

Based on the teachings of *Bakke* and its progeny, and the U.S. Department of Education's long-standing position on voluntary affirmative action efforts to promote student diversity, "thousands of public educational institutions, attempting to provide a more diverse group of students and faculty, have, of their own volition, followed Justice Powell's direction ... to consider minority status as one among many relevant factors." *Scholars' Reply to*

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[5](...continued)
1996). In that letter ruling, OCR states that "[u]nder published OCR policy, which is based on ... [*Bakke*], race and national origin may be used as a factor in higher education admissions ... [when supported by a compelling interest, such as] obtaining the educational benefits of a diverse student body." *Id.* at 12. *See also University of California at Berkeley School of Law*, OCR Case No.10906001 (Sept. 25, 1992); *University of California, San Diego*, OCR Case No. 09-92-2002 (Mar. 21, 1994).

[6] *See also University of Wisconsin, Whitewater*, OCR Case No. 05-90-2106 (Oct. 27, 1994) (finding that statutory race-targeted scholarship program for purposes of meeting institution's diversity objective did not violate Title VI).

Professor Fried, 99 YALE L.J. 163, 166 (1989).[7] Similarly, many states have enacted statutes recognizing the obligation of their public higher education institutions to serve all of their citizens and the concomitant educational benefits derived from a diverse student body.[8] For these reasons,

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[7] At the trial below, for example, the Dean of the Stanford University Law School testified that he "thought we were meeting the requirements of *Bakke*" at the time that school's admissions program was devised. R. Doc. 213 at 19. *See also* Tribe, AMERICAN CONSTITUTIONAL LAW § 16-22, at 1529 (2d ed. 1988) (The Supreme Court in *Bakke* "upheld the kind of affirmative action program used by most American colleges and universities."); Alenikoff & Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after* Shaw v. Reno, 92 MICH. L. REV. 588, 593 (1993) (concluding that Justice Powell's diversity analysis "has achieved widespread institutional incorporation and employers and institutions of higher education have relied on it for the past 15 years."); N.Y. TIMES, Mar. 22, 1996, at A26, col. 1 (editorial) (stating that "Justice Powell's announcement has soundly been regarded as the rule of the *Bakke* case for nearly a generation," and that "[f]or two decades the governing principle of affirmative action in higher education has been that race and ethnicity may be a factor, but only one factor, in choosing among applicants in pursuit of the legitimate purpose of a diverse student body.").

[8] For example, the governing body of the University of Maryland System has been charged to undertake good faith efforts to "assure that women and minorities are equitably represented among the student body ... so that the University reflects the diversity of the State's population." MD. EDUC. CODE ANN. § 12-107(a)(3) (1992). The State of Connecticut has authorized its Board of Governors of Higher Education to "develop a strategic plan ... to ensure that students ... at each institution are representative of the racial and ethnic diversity of the total population of the state." CONN. GEN. STAT. § 10a-11(a) (1996). The State of Wisconsin "finds it in the public interest to

(continued...)

many States have adopted special programs to assist in recruiting members of underrepresented groups to their educational institutions.[9]

Simply put, the decision below is flatly inconsistent with both the well-settled case law supporting the use of race as a factor in securing diversity in the "unique context" of higher education, App. at A70 n.21 (Wiener, J., specially concurring), *and* the long-standing advice and guidance from the U.S. Department of Education. As such, the Court

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[8](...continued)
provide a system of higher education which enables students of all ages, backgrounds and levels of income to participate in the search for knowledge and individual development ... and which fosters diversity of educational opportunity." WIS. STAT. § 36.01(1) (1992). *See also* FLA. STAT. § 228.2001(4) (1989) (requiring public higher educational institutions to "develop and implement methods and strategies to increase the participation of students of a particular race ... in programs and courses in which students of that particular race ... have been traditionally underrepresented.").

[9] *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-1639 (1991) (establishing a university recruitment and retention program directed at economically disadvantaged, minority and underrepresented student populations); ARK. STAT. ANN. § 6-81-802 (1987) (establishing a loan program to assist and encourage black and other minority Arkansans to enter and complete programs leading to certification as public school teachers); IDAHO CODE § 33-4602 (1995) (establishing "Idaho Minority and 'At-Risk' Student Scholarship Act"); IOWA CODE § 261.101 (Supp. 1995) (establishing "Minority Academic Grants For Economic Success"); MONTANA CODE ANN. § 20-25-421(4)(a) (1995) (authorizing the University of Montana System to waive tuition and fees for persons of one-fourth Indian blood in residency in the State); NEB. REV. STAT. § 85-1,125 (1995) (establishing scholarship program for Black, American Indian, and Hispanic minority groups).

of Appeals' decision throws into uncertainty and turmoil a wide variety of race-conscious programs that States have developed in good-faith reliance on *Bakke* to further the compelling interest in fostering diversity.[10]

Amici cannot overstate the importance of *Bakke* and the impact of the Court of Appeals' decision in anticipatorily overruling it. Justice Powell's views on the use of race to further the compelling interest of diversity have been firmly entrenched in the fabric of higher education for almost twenty years, and State and higher education officials have "ordered their thinking and living around that case." *Planned Parenthood v. Casey*, 505 U.S. 833, 835 (1992) (referring to the importance of *Roe v. Wade*, 410 U.S. 959 (1973), in that context). "A vote to overturn *Bakke*, and to forbid all racial preferences in higher education, would be far more socially disruptive than a decision allowing each state to make up its own mind about abortion restrictions," and "would precipitate resegregation on a national scale." Rosen, *The Day The Quotas Died*, THE NEW REPUBLIC, Apr. 22, 1996, at 24, 25.[11] An issue of such significant

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[10] In an attempt to mitigate the confusion surrounding race-based programs since the Court of Appeals' decision was issued, a senior U.S. Department of Education official felt compelled to remind the States that *Bakke* still is one of "the governing precedents for the Department and all fifty states." Healy, *Education Department Urges Public Colleges to Keep Affirmative-Action Programs*, THE CHRONICLE OF HIGHER EDUCATION, May 3, 1996, at A27. Raymond C. Pierce, Deputy Assistant Secretary for Civil Rights, separately explained that the Department is "saying to states, particularly those outside of the Fifth Circuit, that Supreme Court law still rules the nation, so don't act in haste here." *Id.*

[11] *See also* Applebome, *Universities Troubled by* (continued...)

constitutional and social magnitude should not be decided by a lower court, but "by the Supreme Court of a Nation dedicated to the rule of law." *Casey*, 505 U.S. at 865.

II. STATE EXECUTIVE BRANCH OFFICIALS ARE CONSTITUTIONALLY PERMITTED TO DETERMINE THE NEED FOR RACE-CONSCIOUS MEASURES AT PUBLIC UNIVERSITIES TO REMEDY THE PRESENT EFFECTS OF A STATE'S PAST DISCRIMINATION.

This Court should review the decision of the Court of Appeals for the additional reason that the panel opinion virtually eliminates the ability of State executive officials voluntarily to employ race-conscious measures at public universities to correct the present effects of past segregation and discrimination in education.

States have a well-recognized compelling interest in correcting their own past discrimination. *See, e.g., Richmond v. J.A. Croson Co.*, 488 U.S. 469, 503-04 (1989). As Justice Kennedy has explained, a "State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself." *Id.* at 518 (Kennedy, J., concurring). The Court of Appeals gave passing recognition to this principle, App. at A33-34, but then emasculated it in three significant ways.

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[11](...continued)
Decision Limiting Admission Decisions, N.Y. TIMES, Mar. 21, 1996, at A1 ("legal and education experts said ... *Hopwood v. Texas*, ... often dubbed *Bakke II*, had the potential to end affirmative action programs that give preference to minority applicants at state schools nationwide and had further enflamed one of the most contentious issues in American education.").

First, the Court of Appeals held that only past discrimination by the University of Texas School of Law itself could serve to justify race-conscious remedial measures at the School of Law. App. at A36, 40. Such a holding illogically and unrealistically divorces the School of Law from the rest of the University and from the Texas system of higher and lower education of which the School of Law is only one part.[12] Moreover, as this Court held in *Croson*, "the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination." 488 U.S. at 503-04. If there are university-wide, system-wide or statewide findings of continuing effects of prior discrimination, then a State should be permitted to address those effects at the micro level of a program, department or school where the relevant decisions are made, as well as at the macro level through university, system or state policies and programs.

Second, the Court of Appeals held that only the State legislature, not any other governmental body or official, could determine the necessity for remedial measures. App. at A39. This ruling is contrary to this Court's prior

[12] There is no evidence that the School of Law has discriminated against any of its recent applicants, so, according to the Court of Appeals, the School of Law cannot employ race-conscious remedial measures in admissions, regardless of the amount of discrimination practiced by the rest of the University of Texas, by other Texas public higher education agencies, or by Texas elementary and secondary school systems. The same reasoning would apparently apply to other graduate and professional programs and to undergraduate admissions. Texas would thus be faced with an undeniable history of racial discrimination and a legally compelling interest in remedying that racial discrimination, but no acceptable race-conscious method of addressing that history or interest.

decisions deferring to "legislative, *judicial, or administrative*" findings of the necessity for affirmative action. *Bakke*, 438 U.S. at 307 (emphasis added); *Croson*, 488 U.S. at 497.[13] Moreover, this Court has recognized the right of *employers* to gather their own evidence in order to remedy voluntarily the effects of past discrimination. *See, e.g., Wygant*, 476 U.S. at 277; *id.* at 290-93 (O'Connor, J., concurring); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). A State should certainly be entitled to that much or more latitude in correcting its own past mistakes, and it should be constitutionally insignificant whether a State chooses to address such issues by legislative action, or by executive action through its Governor, a statewide coordinating board, or other administrative bodies or officials.[14]

Third, the Court of Appeals wholly excluded from consideration several legitimate present effects of past discrimination. App. at A43. The District Court had found that the "'evidence presented at trial indicates those effects include the law school's lingering reputation in the minority

[13] It is also unrealistic and unworkable to force a legislature to determine what individualized consideration may be given to tens of thousands of applicants to a State's institutions of public higher education.

[14] Pursuant to Justice Powell's recognition that findings of past discrimination can be made by "administrative bodies [that] have been charged with monitoring various activities in order to detect such violations and formulate appropriate remedies," *Bakke*, 438 U.S. at 302 n.41, in Maryland the responsibility for equal educational opportunity and desegregation in postsecondary education has been primarily vested in the Maryland Higher Education Commission, with some of the responsibility shared with the institutions themselves. *See* MD. EDUC. CODE ANN. §§ 10-204(8), 11-105(e), 12-107 (1992).

community, ... an underrepresentation of minorities in the student body; and some perception that the law school is a hostile environment for minorities.'" App. at A41. The Court of Appeals rejected the first and third of these effects as a matter of law, App. at A41, and it rejected the underrepresentation rationale by referring narrowly only to the Law School's own recent nondiscriminatory practices and to the history of how the admissions process was adopted. App. at A44-46.

In contrast to such summary and restrictive treatment, a court should examine any and all actual present effects of past discrimination that are found to exist by an appropriate State actor, as this Court has ordered in elementary and secondary education desegregation cases. *See, e.g., Board of Education v. Dowell*, 498 U.S. 237, 250 (1991) (reiterating that the "vestiges" inquiry should include student assignments, as well as "every facet of school operations -- faculty, staff, transportation, extracurricular activities and facilities.").[15] The complexities of past discrimination and its possible present effects are determinations of fact that should not be decided peremptorily as matters of law, and in this case the record fully supported consideration of more than one present effect of past discrimination in Texas.

These three severe limitations that the Court of Appeals imposed have far-reaching implications not just for Texas, but also for many other States that are attempting to remedy the present effects of past discrimination in education. Over

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[15] *See also* Tatel, *Desegregation Versus School Reform: Resolving the Conflict*, 4 STAN. LAW & POL'Y REV. 61, 66 (1992) (identifying low minority test scores and high dropout rates as common "educational vestiges" of segregation in lower education).

a third of the States have been implicated in litigation involving *de jure* discrimination in postsecondary education.[16] Most of those States achieved compliance with the requirements of Title VI in their systems of higher education only in the late 1980's and early 1990's, and the Office for Civil Rights has announced that it will continue to monitor and investigate those States' compliance with OCR's regulations and this Court's ruling in *United States v. Fordice*, 505 U.S. 717 (1992). 59 Fed. Reg. 4271 (Jan. 31, 1994). Moreover, even after achieving such compliance, the higher education systems in those States may still suffer from continuing effects of their prior discrimination and segregation that may justify race-conscious remedial measures in certain circumstances.[17]

The Court of Appeals' limitations on who may be considered the relevant actor when assessing the need for remedial action, and its restrictions on the depth and quality of the evidence that may be considered, are particularly far-reaching because of the widespread segregation and

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[16] *See, e.g., United States v. Fordice*, 505 U.S. 717 (1992); *Knight v. Alabama*, 14 F.3d 1534 (11th Cir. 1994); *United States v. Louisiana*, 9 F.3d 1159 (5th Cir. 1993); *Richardson v. Blanton*, 597 F.2d 1078 (6th Cir.), *cert. denied*, 444 U.S. 886 (1979); *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973).

[17] *Cf. Dowell*, 498 U.S. at 245-46 (noting differences in usage of "unitary" status, and recognizing that under some usages "a school district could be called unitary and nevertheless still contain vestiges of past discrimination"); *id.* at 249-50 (noting that school board complied with desegregation decree in good faith from 1972, through the 1977 termination of the case and until 1985; and identifying good faith compliance with a decree and "whether the vestiges of past discrimination had been eliminated to the extent practicable" as separate inquiries).

discrimination in elementary and secondary education. This unfortunate history was never limited to southern or border States, but occurred across the country.[18] Many of the efforts to desegregate lower education have been unsuccessful, and in some cases the courts have simply abandoned their oversight without successfully integrating the schools.[19] In other cases, the findings of "unitary" status have been fairly recent, and certainly too recent for schoolchildren to have progressed all the way through integrated, nondiscriminatory systems ready to enter higher education.[20] Thus, affirmative action in higher education admissions remains necessary in many circumstances to address the failures in desegregating lower education.

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[18] *See, e.g., Milliken v. Bradley*, 433 U.S. 267 (1977) (Michigan); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976) (California); *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973) (Colorado); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) (Ohio); *Hart v. Community School Bd. of Educ.*, 512 F.2d 37 (2d Cir. 1975) (New York).

[19] *See, e.g., Ross v. Houston Indep. School Dist.*, 699 F.2d 218 (5th Cir. 1983) (declaring Houston school system unitary, although demographic and other changes rendered effective student integration impractical); *see generally* Kunen, *The End of Integration* (cover story), TIME, Apr. 29, 1996, at 39 (quoting one commentator observing that the courts are simply giving up because "it's too hard").

[20] According to one report, over 500 school districts across the country remained subject to court-ordered desegregation decrees as late as 1991. McCarthy, *Elusive "Unitary Status"*, 69 EDUC. L. REP. 9 (West 1991). *See also* Tatel, at 63 (summarizing continuing court-ordered desegregation plans across the country, and noting that of the 45 largest urban school districts, 13 remained under active court supervision, 17 were under court orders but inactive supervision, and 8 had adopted voluntary desegregation plans).

In sum, the Court of Appeals' decision casts substantial doubt on the ability of the States to address the compelling interest of remedying the present effects of past discrimination in higher or lower education. Review is warranted for this additional reason.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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